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Hurst v. Florida: Retroactivity Doctrine Permits Florida to Ignore the Constitution

BY GRAY R. PROCTOR

Last month in *Hurst v. Florida*,[1] the Supreme Court applied its 2002 decision in *Ring v. Arizona*[2] to hold that Florida's capital punishment scheme is unconstitutional because judges, not juries, decide whether the facts establish aggravating and mitigating factors. Even though Florida courts clearly have misapplied *Ring* for more than ten years, not every defendant with an unconstitutional remedy will have access to any federal remedy. Inmates whose sentences are not ''final''—that is, who have not completed the first full round of appellate review[3]—will be entitled to resentencing.[4] For inmates who have proceeded to or completed post-conviction review, however, the final outcome depends on how Florida courts (and perhaps legislators) react. On federal habeas review, one should not expect *Hurst* to extend beyond defendants whose first federal habeas petitions raised a *Ring* claim and are currently pending or on appeal. This article explains how *Hurst* will filter through federal retroactivity law without applying to defendants who have already completed a full round of habeas review.

The Substance: From *Ring* to *Hurst*

Hurst is best understood with reference to an earlier case, *Ring v. Arizona*.[5] The Constitution guarantees that in a jury trial, every element of the crime must be found by the jury beyond a reasonable doubt.[6] This includes facts necessary to impose a greater sentence—for example, stiffer sentences when an offense is committed as a hate crime.[7] In *Ring*, the defendant was sentenced under Arizona's procedure, which allowed the court to impose a death sentence for felony murder if the judge finds that aggravating circumstances exist. Ring was sentenced to death after the judge found that he was ''the one who shot and killed'' the victim, and was otherwise a ''major participant'' in the crime who displayed a ''reckless indifference to human life.''[8] The Court reversed, holding that because ''Arizona's enu-

[1] 2015 BL 61699 (2015) (98 CrL 333, 1/20/16).

[2] 536 U.S. 584 (2002).

[3] *Linkletter v. Walker*, 381 U. S. 618, 622 n. 5 (1965) (''By final, we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in'' *Batson v. Kentucky*.).

[4] *Lawhorn v. Allen*, 519 F.3d 1272, 1289 (11th Cir. 2008) (holding that state court committed constitutional error by failing to revisit claim where *Riverside* was decided after state supreme court affirmed conviction but before conviction became final by expiration of time to petition SCOTUS for certiorari).

[5] 536 U.S. 584 (2002).

[6] *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

[7] *Id.* at 494 n. 19 (describing similar sentencing enhancements as the ''functional equivalent'' of an element of the offense).

[8] *Id.* at 592-95.

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merated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury.''[9]

Florida's capital sentencing differed in only one respect: a jury rendered an advisory verdict before the judge pronounced sentence.[10] The jury did not make specific findings of fact as to whether an aggravating factor existed to make the defendant death-eligible.[11] Although decisions dating back to the 1980s upheld Florida's scheme, the Court observed that these decisions clearly contradicted the 2000 opinion in *Ring*.[12] The issue was straightforward enough to be decided in an opinion that barely ran 10 pages. Perhaps the only hard question is why it took so long.

A Preliminary Note: Federalism and Florida

Before we discuss federal courts, we should consider whether and why Florida will address its mistakes in state courts. If Florida courts decide that *Hurst* is fully retroactive, federal habeas retroactivity will become irrelevant. Unlike many jurisdictions, the federal standard articulated in *Teague v. Lane*[13] does not apply in Florida state court. Florida applies an arguably more favorable standard,[14] as federal law permits.[15] Thus, Florida can apply *Hurst* retroactively even if federal courts do not. However, the Florida Supreme Court has already refused to apply *Ring* retroactively.[16] There is reason to believe it will not treat *Hurst* likewise.[17]

Analyzing whether the executive or legislative branches might act to vacate all death sentences now unconstitutional under *Hurst* is beyond the scope of this article. It is enough to observe that any such action would require expenditure of an enormous amount of political capital.

Retroactivity, Rules Old and New, and Watersheds

Consider a hypothetical defendant whose petition for certiorari was denied by the Supreme Court on January 3, 2016, just before *Hurst* was decided. Assume Florida courts refuse to apply *Hurst* to grant a resentencing because *Hurst* is not retroactive under state law. Federal habeas review would still be available, so the defendant Florida death row inmates on their first state postconviction motion will have a chance to argue retroactivity in federal court as well. The first inquiry in the federal *Teague* retroactivity analysis is whether the *Hurst* Court announced a ''new rule'': ''Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review.''[18] Thus, if *Hurst* is not a new rule, it definitely applies on federal habeas review to every death row inmate who has not already filed a federal habeas corpus petition, or whose petition has not been decided.

Although generally the new rule inquiry is framed as though almost every decision must create a new rule,[19] it is also established that a decision ''does *not* announce a new rule, [when] it '[is] merely an application of the principle that governed' a prior decision to a different set of facts.''[20] Because Florida's sentencing scheme was not materially different from Arizona's, *Hurst* is simply a straightforward application of *Ring*, and therefore not a new rule. Therefore, it should apply to every death row inmate who can file a federal habeas petition. As discussed below, many cannot.

If the rule in *Hurst* is ''new,'' it is likely that only inmates whose convictions are not final can invoke it. Applying new rules begins with a procedural/substantive dichotomy that effectively determines the outcome. If a new rule is considered to be procedural in nature, it will not be applied retroactively unless it is a ''watershed rule of criminal procedure,'' a designation reserved for rules such as the right to counsel itself.[21] Unsurprisingly, no procedural rule has ever been deemed retroactive.

Moreover, the Supreme Court already decided that *Ring* does not apply retroactively to cases final on direct review in *Schriro v. Summerlin*.[22] In *Schriro*, the federal habeas petitioner had been sentenced to death in 1981 under the Arizona procedures declared unconstitutional in *Ring*. *Ring*'s command—that juries, not judges, find death-eligible aggravating circumstances—was a rule of criminal procedure, and therefore subject to the retroactivity analysis set forth in *Teague*.[23] The Court found that, while juries might be more accurate finders of fact than judges, no evidence unequivocally showed that judicial factfinding ''so 'seriously diminishe[d]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach.''[24]

To summarize: I predict that *Hurst* will be considered an old rule, because it is an extremely straightforward application of *Ring*. Therefore, it will apply retroactively on collateral review to all defendants entitled to the new rule announced in *Ring*, because their convictions were not yet final on direct review. Those whose direct appeals ended before *Ring* was decided will have no right to invoke a *Hurst* claim.

Procedural Complexity in the Federal Habeas Statute: A Retroactive Right in Search of a Remedy

Assume federal courts decide that *Hurst* is an old rule that applies to defendants whose sentences became fi-

[9] *Id.* at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 1 (2000)).
[10] *Hurst*, slip op. at 2-3.
[11] *Id.* at 5-6.
[12] *Id.* at 8-9.
[13] 489 U.S. 288 (1989).
[14] *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005) (observing that the *Witt* standard ''provides more expansive retroactivity standards than those adopted in *Teague*'').
[15] *Danforth v. Minnesota*, 552 U.S. 264 (2008).
[16] *Johnson*, 904 So. 2d at 407.
[17] *See* January 15, 2016 amicus brief in *Lambrix v. Jones*, No. SC-16-56 (Fla.), *available at https://efactssc-public.flcourts.org/casedocuments/2016/56/2016-56_motion_109636.pdf* for counterarguments.
[18] *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).
[19] *Lambrix v. Singletary*, 520 U.S. 518, 527-528 (1997) (explaining that a rule is new unless it would be ''apparent to all reasonable jurists.'').
[20] *Chaidez v. United States*, 2013 BL 44424 (2013) (citations omitted).
[21] *Whorton v. Bockting*, 549 U.S. 406, 418-21 (2007).
[22] 542 U.S. 348 (2004).
[23] *Id.* at 353.
[24] *Id.* at 355-56 (quoting *Teague* at 312-13).

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nal after *Ring* was decided. For the death row inmate sentenced under a clearly unconstitutional procedure, retroactivity is only part of the equation. Two procedural bars complicate the issue when the first, timely habeas petition does not include a claim that Florida's death penalty scheme was unconstitutional. There is no guarantee that defendants entitled to retroactive application of *Hurst* will have a vehicle to raise their claims in federal court.

If the first heabeas petition already has been decided, the petitioner faces the bar on second or successive petitions.[25] Unfortunately, any claim presented in a prior petition must be dismissed. Ironically, petitioners who preserved the *Ring* claim and litigated their interests diligently will be punished by this rule. There is no remedy when courts simply get it wrong the first time.[26]

Petitioners who did not bring a *Hurst* claim in their first petition likely will fare no better. The federal statute allows second petitions only when ''the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'' This language tracks *Teague* and requires a new, watershed rule of criminal procedure. As discussed above, I predict either *Hurst* is an old rule or else it is not retroactive; either way, it cannot be brought in a second petition. Moreover, until the Supreme Court decides the issue, the Circuit Courts of Appeals are bound to deny permission to file a successive petition within 30 days of the date the prisoner requests it.[27] Because the one-year statute of limitations begins on the date *Hurst* was decided—not on the date retroactivity is decided—any favorable Supreme Court decision may come too late, as the court itself has observed.[28]

What of petitioners still on federal review who failed to raise a *Ring* claim when they filed the initial petition? *Hurst* applies to their case, but it may have come too late to amend the petition to add a *Hurst* claim. An exception to the one-year limitations period restarts it on ''the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.''[29] Although lower courts can decide the retroactivity issue for this exception, they have ignored the difference from the statutory language on second petitions and also apply this exception only to new, watershed rules of criminal law.[30] While many attorneys brought *Ring* claims, unfortunately some attorneys have failed to do so in the initial habeas petition.[31] While in the future similarly situated petitioners may be aided by better representation by the relatively new federal capital habeas unit,[32] current petitioners probably have no recourse.

The doctrine of exhaustion generally requires that any claim for relief be properly presented to state courts first and decided on the merits.[33] Florida similarly prohibits relitigation of claims raised in a first post-conviction motion and generally prohibits raising new claims in a successive petition.[34] If Florida courts will not now hear the issue on the merits, the *Hurst* claim will be procedurally defaulted.[35] However, two exceptions might apply. The first applies when a petitioner's attorney renders ineffective assistance of counsel by failing to raise a claim.[36] Because an attorney cannot raise a claim of ineffective assistance against him- or herself, this exception further illustrates the usefulness a specialized federal capital habeas unit in every district in Florida.[37] Although I believe most attorneys would

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[25] 28 U.S.C. § 2244.

[26] Gray Proctor and Nancy King, ''Post-*Padilla*: Padilla's Puzzles for Review in State and Federal Courts,'' 23 Fed. Sent. Rep. 3, at 242 (Feb. 2011) (''What of the petitioner whose claim was properly raised in the first petition, only to be rejected in violation of *Padilla*? In this situation, the federal statute bars relief. . . .'').

[27] 28 U.S.C. § 2244(b)(3).

[28] *Dodd v. United States*, 545 U.S. 353, 363-66 (2005) (Stevens, J., Dissenting); *Tyler v. Cain*, 533 U.S. 656, 676-77 (2001) (Breyer, J. Dissenting, joined by Stevens, Souter, Ginsberg).

[29] 28 U.S.C. § 2244(d)(1)(C).

[30] *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207 (11th Cir. 2012).

[31] Information on this issue from PACER is on file with the author. Research shows that at least eleven cases pending in the district courts or on appeal did not raise *Ring* claims. This excludes all convictions final before *Apprendi* (the ''new rule'' beyond which retroactivity will not reach) and includes one case final between *Apprendi* and *Ring*.

[32] *See Lugo v. Sec'y, Dep't of Corr.*, 750 F.3d 1198 (11th Cir. 2014) (Martin, J., concurring) (demonstrating that counsel for more than 8% of Florida's death row population forfeited their clients' right to federal habeas review by filing after the statute of limitations elapsed).

[33] 28 U.S.C. 2254(b).

[34] Fla. R. Crim. P. 3.850(h)(2) (identical claims may be dismissed; new claims may be dismissed if no good cause exists for failing to raise in the first petition); Fla. R. App. P. 9.141(d)(6) (similar rule for allegations of ineffective assistance of appellate counsel, applicable if the claim was not raised on direct appeal in state court).

[35] Florida's post-conviction review procedures include many of the same restrictions federal petitioners face. E.g., Fla. R. Crim. P. 3.851(e)(2) (''A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits. . . .'').

[36] *Edwards v. Carpenter*, 529 U.S. 446 (2000) (direct review); *Martinez v. Ryan*, 123 S. Ct. 1309 (2012) (post-conviction counsel). It is unclear whether the *Martinez* doctrine could be applied to excuse petitioners from the *Edwards* requirement that, to serve as good cause for failure to raise below, claims of ineffective assistance of counsel on direct review must themselves be raised on collateral review in state court. One expects courts to balk at extending *Martinez*. *Hamm v. Comm'r, Ala. Dep't of Corr.*, 620 F. App'x 752, 784 (11th Cir. 2015) (''Until the Supreme Court instructs otherwise, we are constrained to respect the explicitly limited holding of *Martinez* and the narrow construction our opinions have given that decision.'').

[37] *Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013) (holding that capital habeas petitioners, entitled to appointment of counsel, must also be appointed independent counsel to search for Martinez-based claims if the federal habeas attorney also represented the petitioner in state post-conviction proceedings); see also Devon Lash, ''Note: Giving Meaning to 'Meaningful Enough': Why Trevino Requires New Counsel on Appeal,'' 82 Fordham L. Rev. 1855 (March 2014); Lawrence Kornreich and Alexander Platt, ''The Temptation of Martinez v. Ryan: Legal Ethics for the Habeas Bar,'' 8 Crim. L. Brief 1, 4-5 (Fall 2012) (illustrating ethical issues and concluding that ''After Martinez, when a lawyer fails to completely raise a possible ineffective-assistance-of-counsel claim on first-tier collateral proceedings . . . she has an ethical obligation to bring in outside counsel to review the record below and advise her client regarding the merits of such a claim. And, if her client chooses to go forward with the Martinez claim, he must use new counsel to do so.'').

agree that counsel would render ineffective assistance by failing to raise the *Ring* issue in a capital case, the presence of state and federal case law directly rejecting a *Ring* challenge may lead courts to come to a different conclusion.[38] The second exception recognizes that the novelty of a new rule may serve as good cause for failure to raise the claim below. However, with *Hurst* such an obvious application of *Ring*, claims of novelty are not likely to pass the threshold that the new rule be ''so novel that its legal basis was not reasonably available to counsel.''[39] Petitioners who did not raise their claims in Florida courts first may or may not be able to avoid the exhaustion requirements, potentially preventing more defendants from vacating their unconstitutional death sentences.

[38] *Pimental v. Fla. Dep't of Corr.*, 560 F. App'x 942, 944 (11th Cir. 2014) (''To provide effective representation, lawyers are not required to 'make arguments based on predictions of how the law may develop.' '') (quoting *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994)).

[39] *Reed v. Ross*, 468 U.S. 1, 16(1984).

Conclusion

Without the need for any complicated analysis, we can say that *Hurst* clearly applies to all capital defendants whose cases are not yet ''final''—that is, those whose cases have not yet been considered or rejected by the U.S. Supreme Court. *Hurst*, a straightforward application of existing precedent, is an ''old rule'' for the purposes of federal retroactivity, and therefore applies to anyone who was entitled to the benefit of the ''new rule'' announced in *Ring*—that is, anyone whose conviction was not final when *Ring* was decided on June 24, 2002.

Nevertheless, many of these defendants will have no procedural vehicle for federal habeas relief. Petitioners whose initial federal habeas petition has been decided will not be able to file a second petition to raise the *Hurst* claim. Unfortunately, even heartbreakingly, defendants with an initial petition pending will not be able to amend to raise a *Hurst* claim if they did not raise it initially, and those who did not raise it in their first state post-conviction petition may not be able to now. Florida courts failed these defendants by disregarding *Ring*; counter-intuitively, only Florida's courts or legislature can save them now.

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